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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 405

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST NO. 4954,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinion of the Court Below	2
Grounds on Which the Jurisdiction of This Court Is Invoked	2
Questions Presented for Review	2
Statutes and Rules Involved	3
Statement of the Case	5
Jurisdiction of the Court Below	8
Argument:	
The Injunction Permanently Restraining Prosecution of Proceedings in the Superior Court of Cook County, Illinois	9
Co-Parties not bound by prior adjudication unless they were adversaries in the original proceeding	10
Where jurisdictional defect appears on the face of the record, it is always subject to attack	10
The Motion Under Rule 60(b) (4) of the Rules of Civil Procedure for United States District Courts	13
Conclusion	16
Appendix:	
Opinion of the United States Court of Appeals for the Seventh Circuit	17

Cases Cited.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (Distinguished) 11
City Bank of Wheeling v. Rhodehamel, 223 F. 979, 983 10
Dobbins v. Barnes, 204 F. 2d 546, 548 10
Gilbert v. Davis, 235 U. S. 561 15
Hicklin v. Edwards, 226 F. 2d 410, 413 15
Indianapolis v. Chase National Bank, 314 U. S. 63, 69 ..... 9, 15
Jackson v. Irving Trust Co., 311 U. S. 494 (Distinguished) 11
Mitchell v. Maurer, 293 U. S. 237, 244 ..... 9, 15
Mitchell v. Village Creek Drainage District, 158 F. 2d 475, 478 11
Ohio Casualty Company v. Gordon, 95 F. 2d 605, 609 .. 10
State of Missouri v. Title Guarantee & Surety Co., 72 F. 2d 595, 598 10
Stoll v. Gottlieb, 305 U. S. 165 (Distinguished) 11
United States v. United States Fidelity & Guaranty Co., 309 U. S. 506, 514 11

Statutes Cited.

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28 U. S. Code, Section 2101(c) 2
28 U. S. Code, Annotated 1927 Ed. Sec. 41 3
28 U. S. Code, 1952 Edition, Sec. 2283, Page 4410 3
28 U. S. Code, 1952 Edition, Rule 60, Page 4344 .....4, 13

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7 Moore's Federal Practice, Second Edition, Sec. 60.25(4), page 274 14

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AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

Petitioner, Joseph M. Taussig, Respondent and Defendant-Appellant in the proceedings below, petitions this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Seventh Circuit to review the judgments of that Court entered April 2, 1958, affirming two orders entered by the United States District Court for the Northern District of Illinois, Eastern Division, on June 26, 1957, the first of which permanently restrained and enjoined Petitioner from prosecuting a certain action at law against American National Bank and Trust Company

of Chicago in the Superior Court of Cook County, Illinois (App. 191), and the second of which denied the motion of Petitioner to vacate and set aside a certain final decree entered in said Court on June 4, 1947, and all proceedings supplemental thereto (App. 190).

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 255 F. 2d 765 under the caption "*American National Bank and Trust Company of Chicago, as Trustee, etc.* v. *Joseph M. Taussig*" and also is set forth in the Appendix to this Petition.

The United States District Court for the Northern District of Illinois, Eastern Division, rendered no opinion.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgments of the United States Court of Appeals sought to be reviewed, were entered April 2, 1958 (Rec.). A petition for rehearing was denied by said Court of Appeals on July 2, 1958 (Rec.).

This Court has jurisdiction to review the judgments in question by the issuance of a Writ of Certiorari under 28 U. S. C. § 1254(1). This petition is filed within ninety days after the denial of said petition for rehearing by said Court of Appeals, as required by 28 U. S. C. § 2101(c).

THE QUESTIONS PRESENTED FOR REVIEW.

The primary question presented for review is whether a United States District Court could properly restrain a State Court proceeding by one defendant in a cause formerly pending in the District Court upon which a final

decree had been entered, against a co-defendant with respect to whom the District Court's original jurisdiction had not been litigated, it appearing on the admitted facts that the District Court had no jurisdiction of the original action by reason of the absence of diversity of citizenship between parties plaintiff and parties defendant in that proceeding.

A subsidiary question is presented as to whether, with respect to that Respondent, want of federal jurisdiction to enter the original decree having been called to the attention of the Court by a proper motion under Rule 60(b) of the Rules of Civil Procedure for United States District Courts, the District Court could properly summarily decline to entertain said motion.

STATUTES AND RULES INVOLVED.

Former section 24 of the Judicial Code as amended (28 U. S. Code Annotated 1927 Edition, Section 41, page 32) which provided as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "(1) *United States as plaintiff; civil suits at common law or in equity.*
>
> First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. and * * * (b) is between citizens of different states * * *."

28 U. S. Code (1952 Edition), Sec. 2283, p. 4410:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts, 28 U. S. Code (1952 Edition), Rule 60, p. 4344:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void; * * * The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

STATEMENT OF THE CASE.

This litigation arises out of a suit for breach of trust and an accounting filed by Ruth Taussig Saxelby, a sister of Petitioner, and a citizen and resident of New York, on behalf of herself and all other beneficiaries under the Trusts created by the Will of Maurice Taussig, deceased, against Petitioner, a citizen of Illinois, Respondent American National Bank and Trust Company, as Trustee, and one Irvin H. Robitshek of Minnesota, co-trustee with Petitioner of the trusts created by said Will. This suit was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on December 20, 1945 (Tr. 13-16)*

Petitioner was a co-executor and a co-trustee under the Will of his father who died testate in Chicago, Illinois, August 2, 1931 (Tr. 2, 128). The estate was then insolvent (Tr. 85). Petitioner, with approval of the Probate Court of Cook County, Illinois, negotiated an arrangement whereby a mortgage on an apartment building known as 4850 Drexel Boulevard, Chicago, Illinois, comprising one of the assets of the estate, was cancelled, the property was converted into small apartment units and Petitioner purchased the property at an executor's sale and caused title to be conveyed to Respondent, American National Bank and Trust Company of Chicago, as trustee for Petitioner alone under its Trust No. 4954 (Tr. 91, 134, 135).

* The designation "Tr." refers to the page number of the Appendix in *Ex Parte Joseph M. Taussig, Petitioner*, No. 9586 in the United States Circuit Court of Appeals for the Seventh Circuit, October Term 1947, which contains all of the material pleadings in the original case of *Saxelby, et al. v. Taussig, et al.*, No. 45C 2271 in the United States District Court for the Northern District of Illinois, Eastern Division, and by stipulation was made a part of the Record on Appeal in this cause. The designation "App." refers to Appellant's Appendix in Cause No. 12137-38 in the United States Court of Appeals for the Seventh Circuit, and the designation "Supp. App." refers to the Supplemental Appendix filed by Appellees in said Cause No. 12137-38.

The principal beneficiary under the Will of Maurice Taussig and the trusts created thereby was Petitioner's brother, Leo Taussig, an incompetent, for whose benefit a trust sufficient to provide an income of $5,000.00 per annum for life was created which was made a first lien on the entire trust estate (Tr. 23, 24, Trust Tr. 21-37). At the time the principal litigation below was commenced (December 20, 1945, Tr. i 1) there never had been sufficient income to provide for Leo (App. 61). In Ruth Saxelby's complaint, Leo Taussig was alleged to have been a resident of Wisconsin, in which State he had been residing in a sanitarium (Tr. 2). Leo actually was a citizen and resident of Illinois at the time he became incompetent (Tr. 149).

The question of want of Federal jurisdiction by reason of absence of diversity of citizenship between the defendant trustees and certain other beneficiaries (Fannie Daus—Petitioner's aunt—a resident of Illinois; and Ella Robitshek—Petitioner's sister—a resident of Minnesota) was raised at the outset by Petitioner and by Respondent, his co-defendant (Tr. 38, 42, 51, 58, 59). That Leo Taussig was actually a citizen and resident of Illinois was called to the attention of the Court on May 19, 1947 (Tr. 149-152), a date after the Court had found Petitioner guilty (Tr. 111) but before the Court entered its decree (Tr. 158-161). Leo Taussig had died on February 19, 1947 (Tr. 159). On June 2, 1947, the Court entered its Findings of Fact that Leo Taussig was at the time of the institution of the proceedings a citizen and resident of Illinois (Tr. 159) but Petitioner's motion to dismiss for lack of jurisdiction was overruled (Tr. 162) and the final decree dismissed Leo Taussig as a party by reason of his death (App. 29, Tr. 163).

The Court's decree of June 4, 1947 directed Petitioner to direct Respondent to transfer the Drexel property to a

successor trustee (The Northern Trust Company). It also directed Respondent to transfer the property (Tr. 163-5). Petitioner immediately directed Respondent to appeal from the decree and to direct Chicago Title and Trust Company which had guaranteed the title to the Drexel property likewise to appeal (App. 160). Respondent, instead of appealing, forthwith resigned its trust (App. 151, 160) and conveyed without directions from Petitioner, the Drexel property to the successor trustee (App. 151, 160). Thereafter, in a stipulation to which Respondent was not a party, Petitioner agreed not to appeal from the decree of June 4, 1947 (App. 91-93). The District Court continued from time to time expressly to retain jurisdiction of the cause of Saxelby *vs.* Taussig for the purposes of instructing the successor trustee and the like until the present time (App. 106, 107, App. 109-123, App. 133-141).

On June 6, 1957, Petitioner filed a suit against Respondent in the Superior Court of Cook County, Illinois, alleging a breach of agreement in conveying the Drexel property contrary to and without his authorization and direction (App. 161-163). Thereafter, Respondent filed its petition in the case of *Saxelby v. Taussig*, praying for a permanent injunction enjoining Petitioner's Superior Court suit and for a mandatory order directing Petitioner to execute a written direction to Respondent to convey the Drexel property *nunc pro tunc* as of June 6, 1947, the date of its conveyance (App. 153). On June 26, [illegible] the District Court granted the relief prayed for (App. 19[illegible]3) summarily without affording Petitioner an opportunity to file an appropriate responsive pleading (App. 180, 182, 184). At the same time, Petitioner's motion under Rule 60(b) of the Rules of Civil Procedure for United States District Courts to Vacate the Decree of June 4, 1947 because it was void for want of federal jurisdiction was summarily denied (App. 184, 190). On appeal both of

these orders were affirmed by the United States Court of Appeals for the Seventh Circuit (App. this Petition).

JURISDICTION OF THE COURT BELOW.

The United States District Court for the Northern District of Illinois, Eastern Division, did not have federal jurisdiction of the original breach of trust proceeding brought by Ruth Saxelby. This want of federal jurisdiction was called to the attention of that Court when Respondent's petition to enforce compliance with the Court's decree was first presented (App. 174) and simultaneously therewith was formally called to the attention of the court below by Petitioner's motion under Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts, praying that the Court's decree of June 4, 1947, and all subsequent proceedings in the cause be vacated and set aside for want of federal jurisdiction (App. 142-148).

ARGUMENT.

The Injunction Permanently Restraining Prosecution of Proceedings in the Superior Court of Cook County, Illinois.

Had the United States District Court for the Northern District of Illinois heeded the decision of this Court in *Mitchell* v. *Maurer*, 293 U. S. 237, 79 L. Ed. 162, 55 S. Ct. 162 (293 U. S. at p. 244): "Unlike an objection to venue, lack of Federal jurisdiction cannot be waived or be overcome by an agreement of the parties" that Court would *sua sponte* have dismissed the cause before the trial had proceeded. The mere fact that Leo Taussig, who was the real party plaintiff and was the only party plaintiff with respect to whom an actual collision of interest existed at the time of the filing of the complaint in the United States District Court, was aligned by plaintiff, Ruth Saxelby, as a party defendant, is of no significance. As this Court determined in the case of *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, at page 69: "Diversity of jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is our duty, as it is that of the lower courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.'"

With respect to Respondent, American National Bank and Trust Company, a co-defendant with Petitioner in the original proceedings and as to whom Petitioner conducted no adversary litigation either on the subject matter of federal jurisdiction or otherwise, in that proceeding, did Petitioner's subsequent action in failing to appeal from the decree of the United States District Court operate

so as to bestow upon that Court federal jurisdiction theretofore lacking? In this proceeding the United States District Court and the United States Court of Appeals for the Seventh Circuit so held, notwithstanding any action to which Respondent was a party upon which any estoppel could be based. In so holding, we respectfully submit, the decisions of the courts below are in conflict with the decisions of other Courts of Appeals in two respects:

First: It is a principle uniformly applied by all United States Courts of Appeals which have had occasion to pass upon the question that with respect to jurisdiction or otherwise, *res judicata* does not apply between co-parties who were not adversaries in the proceedings relied upon as constituting a former adjudication of the issues. The Court is referred to the decision of the United States Court of Appeals for the Ninth Circuit in *Dobbins* v. *Barnes*, 204 F. 2d 546, at page 548, where that Court stated:

> "It is a rule of universal application that 'parties to an action are not bound by the judgment, in a subsequent controversy with each other unless they were adversary parties in the original suit.'"

The Court is also referred to the Fourth Circuit case of *City Bank of Wheeling* v. *Rhodehamel*, 223 F. 979, 983, and the Tenth Circuit case of *Ohio Casualty Company* v. *Gordon*, 95 F. 2d 605, 609.

Second: The courts below overlooked the fact that by its own decree the United States District Court for the Northern District of Illinois specifically found as a fact the Illinois citizenship and residence of Leo Taussig and the jurisdictional defect therefore appeared on the face of the record and as such was always open to attack.

The Court is referred to *State of Missouri* v. *Title Guarantee & Surety Co.*, 72 F. 2d 595, where the Court of Appeals for the Eighth Circuit said (p. 598): "If the record

discloses jurisdictional defects which render the judgment void, then it is subject to collateral attack in a law action."

The Court is also referred to the more recent case in that same Circuit of *Mitchell* v. *Village Creek Drainage District*, 158 F. 2d 475, in which that court said (p. 478): "Be that as it may, it cannot, we think, be gainsaid that a judgment void on its face for want of jurisdiction may be attacked either in a direct proceeding or collaterally."

The United States Court of Appeals in this proceeding gave no serious consideration to the point here urged apparently believing the subject to be foreclosed by this Court's opinions in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371; *Stoll* v. *Gottlieb*, 305 U. S. 165; and *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, which are to the general effect that the facts upon which federal jurisdiction is based are categorized as quasi-jurisdictional facts not subject to attack except upon direct appeal. We respectfully submit the court below overlooked this Court's opinion in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, in which this Court expressly stated (p. 514):

> "In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments, concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

We also respectfully submit that this Court's prior decisions in any event have not touched upon the situation where the very fact establishing the lack of federal juris-

diction was specifically found in the decree sought to be attacked or reviewed.

By virtue of Petitioner's agreement with Respondent as to the Drexel property, he had certain contract rights against Respondent. These rights were not litigated in the case of *Saxelby* v. *Taussig*. He had a right to litigate his contract action against Respondent in a tribunal of his choosing. He had a right to litigate this contract action involving, among other things, the consequences of Respondent's failure and refusal to appeal from the United States District Court's decree of June 4, 1947 without suffering the consequences of an injunction in the court below. He had a right to litigate in that proceeding the question of whether any issues—jurisdictional or otherwise—as between Petitioner, the beneficiary and grantor of a real estate trust and American National Bank and Trust Company as trustee, were in fact affected in any way by the proceedings in the case of *Saxelby* v. *Taussig*. Under these circumstances, we respectfully submit, the United States District Court for the Northern District of Illinois, Eastern Division, erred in enjoining the proceedings instituted in the Superior Court of Cook County, Illinois by Petitioner, asserting as against his former trustee, those contract rights. With respect to these issues we respectfully submit, the action of the District Court in summarily granting a permanent injunction offended the prohibition of 28 U. S. Code §2283 and offended the "hands off" policy with respect to such litigation imposed by that section of the Code.

The Motion Under Rule 60(b)(4) of the Rules of Civil Procedure for United States District Courts.

The action of the United States District Court in refusing to consider Petitioner's motion to vacate and expunge the decree of June 4, 1947, and that of the United States Court of Appeals in affirming the District Court's order, presents for determination, we respectfully submit, an important question of federal law which has not been, but should be settled by this Court.

Petitioner's motion was presented to the court below approximately ten years after the entry of the decree involved. Petitioner's motion however expressly disclaimed any intention to interfere with the divers financial settlements with the beneficiaries of the Taussig Trusts which had taken place subsequent to the entry of the decree. On the other hand, Petitioner's motion asserted that Petitioner possessed certain valuable rights against American National Bank and Trust Company and Chicago Title and Trust Company "each of which said institutions at all material times were duly apprised and had knowledge or notice of the absence of federal jurisdiction in the above entitled cause and the nature of affiant's claims." (App. 148.)

Rule 60(b)(4) now contains the language "upon such terms as are just, the Court may relieve a party * * * from a final judgment for the following reasons * * * (4) the judgment is void * * * The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment." Prior to the adoption of this rule it had always been generally understood that all courts have the inherent power to vacate, at any time, their own judgments rendered without jurisdiction. Two of the recognized authorities on federal procedure have apparently taken the position that with respect to

judgments void for want of jurisdiction, Rule 60(b)(4) has made no change and that a reasonable time within the meaning of the Rule should be interpreted as at any time at all. We refer the Court to 10 Cyclopedia of Federal Procedure, Third Edition, § 37.12, which states:

> "As to void judgments and those rendered without or beyond jurisdiction there is and can be no time limitation, since they are not existant and futile *ab initio*."

We also refer the Court to the more lengthy discussion on the same point in 7 Moore's Federal Practice, Second Edition, Sec. 60.25(4), page 274, where it states:

> "(4) Time for Motion.
>
> "Unlike clauses (1)-(3) a motion under clause (4) is not subject to a maximum time limitation of one year, but like a motion under Clauses (5) and (6) the Rule provides that the 60(b)(4) motion must be made within a reasonable time. What is the meaning of the 'reasonable time' limitation with respect to a motion for relief from a void judgment?
>
> "The theory underlying the concept of a void judgment is that it is legally ineffective—a legal nullity, and may be vacated by the court which rendered it at any time (*United States* v. *Sotis*, CCA 7th 1942, 131 F. 2d 783, 787). Laches of a party cannot cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life (see *People* v. *Muller* (1930), 339 Ill. 573, 579, 171 N. E. 672; *State Bank of Prairie du Rocher, Illinois* v. *Brown* (1931), 263 Ill. App. 312, 316). * * * Further it may, when appropriately called in question be adjudged void in any collateral proceeding, and the collateral attack may be made at any time. Since a federal judgment that is void can be so collaterally attacked, and since the judgment sustaining the collateral attack would have to be given effect in a subsequent 60(b)(4) motion to set the federal judgment aside as void, 'the reasonable time' limitation must generally mean no

time limit, atlhough there may be exceptional situations where the reasonable time limitation would require diligence on the part of the movant."

This meaning of the Rule was apparently adopted by the Court of Appeals for the Eighth Circuit in *Hicklin* v. *Edwards*, 226 F. 2d 410, where that Court stated (p. 413):

> "The mandate the rule imposes on the Court to relieve a party from a judgment 'for the reason that the judgment is void' is broad and unqualified and contains no restrictions in respect to any of the reasons that may be shown to render the judgment void."

Petitioner asserted no claim against the parties with respect to whom he occupied an adversary position in the original proceeding of *Saxelby* v. *Taussig*. He believes that with respect to the assertion of his rights against his former trustee and Chicago Title and Trust Company, both of whom were notified by him to appeal from the decree of June 4, 1947; his pending litigation and any future litigation should be unimpeded by a decree which admittedly the United States District Court lacked federal jurisdiction to enter. With respect to these parties, there exists no element of estoppel calling for the imposition of terms and in view of this Court's decision in *Mitchell* v. *Mauer*, 293 U. S. 237, and also this Court's earlier decision in *Gilbert* v. *Davis*, 235 U. S. 561, and *Indianapolis* v. *Chase National Bank*, 314 U. S. 63, since the duty to determine federal jurisdiction is a duty imposed upon the court itself, not to be affected by waiver or the agreement of the parties, logic seems to impel that consideration be given to any and all motions asserting the want of federal jurisdiction to enter a decree and that the refusal to entertain any such motion, if properly presented, must necessarily constitute an abuse of discretion to be corrected upon review.

CONCLUSION.

We respectfully submit a Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered April 2, 1958, and that upon such review, said Court's judgment in Cause 12137 should be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois with directions to vacate the permanent and mandatory injunctions appealed from, and with respect to that Court's judgment in Cause 12138, that said judgment be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois, with directions to grant Petitioner's motion to vacate its decree of June 4, 1947, and all subsequent decrees with respect to Respondent, American National Bank and Trust Company of Chicago, and after hearing, that said Court enter such order as may be just under the circumstances with respect to the remaining parties to said decree.

Respectfully submitted,

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APPENDIX.

Opinion of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Nos. 12137 and 12138

SEPTEMBER TERM, 1957—JANUARY SESSION, 1958

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee, etc.,
Petitioner-Appellee,
No. 12137 *vs.*
JOSEPH M. TAUSSIG,
Respondent-Appellant.

RUTH SAXELBY, ET AL.,
Plaintiffs-Appellees,
No. 12138 *vs.*
JOSEPH M. TAUSSIG, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

April 2, 1958.

Before FINNEGAN and HASTINGS, *Circuit Judges,* MERCER, *District Judge.*

MERCER, *District Judge.* Both appeals herein are from orders entered by the United States District Court for the Northern District of Illinois, Eastern Division, in

the case of *Ruth Saxelby, et al.*, v. *Joseph M. Taussig, et al.*, Civil Action No. 45 C 2271. This litigation has previously been before this Court in *Ex parte Joseph M. Taussig* No. 9856, October, 1947 Term, and in *Taussig* v. *Chicago Title and Trust Company*, 171 F. 2d 553.

The original complaint was filed December 20, 1945 by Ruth Saxelby, a beneficiary of a trust created under the Will of her father, Maurice Taussig. Relief was sought against her brother, Joseph M. Taussig, appellant herein, and against a co-trustee; American National Bank and Trust Company of Chicago, as Trustee, was also a defendant.

On June 4, 1947 (more than ten years ago) the District Court entered the first of seven final decrees. The first decree removed appellant and his co-trustee as testamentary trustee, appointed as their successor in trust The Northern Trust Company and directed a conveyance to the successor trustee of the real estate held by American National as land trustee for appellant. This decree also directed the appellant to execute and deliver to American National a written direction authorizing such conveyance. American National complied with the decree, conveyed the real estate to the successor trustee and advised appellant of its action. However, appellant did not execute the direction.

Thereafter, final decrees were entered October 26, 1948, December 30, 1948, June 2, 1949, October 20, 1950, May 6, 1952 and November 4, 1952. The decree of October 26, 1948 approved the Master's Report on re-reference, overruled objections and entered additional personal judgments against appellant and Robitshek, charging fees and expenses against appellant and making the same an equitable lien against his interest. The decree of December 30, 1948 settled the controversies between the parties, entered upon express stipulation of appellant, the stipula-

tion providing that s terms were conclusive upon all parties, including appellant, and provided that acts done in compliance with the decree shall not be questioned or attacked, directly or indirectly in this or any other court'. The decree of June 2, 1949 construed the Will of testator, authorized further distribution of the trust estate to beneficiaries, including appellant as one of the beneficiaries, and provided for attorney fees, including appellant's attorney. This decree was also entered pursuant to a stipulation executed by appellant. The decree of October 20, 1950 authorized a private sale of real estate, provided for distribution to the appellant out of the purchase price, liquidation of appellant's indebtedness and payment of appellant's attorney fees and expenses. This order was entered with appellant's consent. The decree of May 6, 1952 authorized payment of income tax deficiency assessments out of a reserve held in trust for this purpose. Appellant renewed his objections to the jurisdiction of the court but these objections were overruled. The decree of November 4, 1952 approved an accounting of the successor trustee; appellant objected upon jurisdictional grounds and the objections were overruled.

No appeal was taken from any of the above-mentioned decrees.

No action was taken by or requested of the District Court after the decree of November 4, 1952, until June 26, 1957 when a petition was filed by American National and a Motion was filed by appellant.

On June 6, 1957 appellant sued American National in the Superior Court of Cook County for $500,000.00, alleging that American National's conveyance in compliance with a former decree was a breach of agreement. The petition of American National filed June 26, 1957 prayed that appellant be ordered to comply with the decree of June 4, 1947 and that appellant be permanently enjoined

from prosecuting the State Court action. The court found that appellant's failure to execute and deliver to American National a proper direction was a direct violation of the 1947 decree and that the State Court action was predicated upon such violation. Appellant was ordered to execute and deliver the direction and was permanently enjoined from prosecuting the Superior Court action. The appeal in No. 12137 is taken from this order.

On the same day, June 26, 1957, appellant filed a motion 'to vacate, set aside and hold for naught and expunge from its records, this Court's final decree of June 4, 1947, all supplemental proceedings and decrees, including this Court's decree of December 30, 1948, and all other proceedings in the above cause'. The Court denied appellant's motion and the appeal in No. 12138 is taken from that order.

The contested issues in these appeals are:

(1) Whether the issues sought to be reopened by appellant after ten years delay are *res adjudicata* by reason of their prior adjudication in the unappealed decrees of the District Court in *Saxelby, et al.*, v. *Taussig, et al.*, No. 45 C 2271.

(2) Whether appellant is estopped to attack the decree of the District Court.

(3) Whether the granting of American National's petition of June 26, 1957 was a proper exercise of the District Court's power to require compliance with its decree of June 4, 1947 and to protect such decree by enjoining litigation in a state court.

(4) Whether appellant's motion to vacate and expunge from the record all final orders was correctly denied.

We are of the opinion that the District Court's decree of June 4, 1947 and subsequent decrees in which it found that it had jurisdiction are not void and the same are *res adjudicata* in this case. The case of *Sorenson, et al.*,

v. *Sutherland, et al.*, 2 Cir. 109 Fed. 2d. 714, (aff'd by Supreme Court, 311 U. S. 494) states clearly the pertinent principles of *res adjudicata* as applied to a belated attack (by motion to vacate) on an unappealed decree on the ground that the court lacked jurisdiction to enter it.

In that case a decree was entered by the District Court against the Alien Property Custodian and the Treasurer of the United States, in an action under the Trading with the Enemy Act. A jurisdictional question was whether a party named 'Sielcken' was a resident of the United States or of an enemy country, Germany, which under the Act would bar recovery. No appeal was taken by the government. About nine years later a motion was made by the Attorney General to vacate the original decree on the ground that the court lacked jurisdiction because Sielcken was, in fact, a resident of Germany. The District Court allowed the motion and entered an order vacating the original decree. The Court of Appeals reversed in an opinion which is very much in point. The pertinent part of the opinion reads as follows:

> "* * * the court was apparently of the belief that if it found Sielcken to have been in fact a resident of Germany the issues raised by the original bill and answers and necessarily determined in favor of the plaintiffs by Judge Caffey could be disregarded because his decision was based on erroneous findings affecting jurisdiction. But whatever may have been the trend of the earlier authorities the decisions of the Supreme Court in *Chicot County Drainage District* v. *Baxter State Bank, supra*, decided January 2, 1940, and *Stoll* v. *Gottlieb*, 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104, make the decree of December 30, 1949, *res adjudicata* as to the issues involved in the motion to vacate. * * * In *Chicot County Drainage District* v. *Baxter State Bank, supra*, the Supreme Court held the parties to an action to be bound by a judgment of a United States District Court which

necessarily involved recognition of an act as constitutional, even though the act was later in another proceeding held to be invalid. * * * Attack on the former judgment on the ground that lack of jurisdiction made it void was therefore precluded. * * *".

In *Chicot County Drainage District v. Baxter State Bank*, 308 U. S., 371 at Page 376, the Court said:

"* * * The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally."

In *Treines v. Sunshine Mining Co.*, 308 U. S. 66, the Court said:

"One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues (citing *American Surety Co. v. Baldwin*, 287 U. S. 156) as well as to jurisdiction of the subject matter as of the parties."

The appellant herein having acquiesced and having sat by for ten years after the unappealed decree of June 4, 1947 was entered, having joined in the settlement decree of December 30, 1948 and having consented to the other decrees above mentioned and having agreed to be bound thereby and not to appeal therefrom or attack such decrees in any way, having permitted the successor trustee to take various irreversible actions under said decrees and having accepted benefits thereof, including acceptance of his distributive share of the proceeds of the sale of the Drexel property, is clearly subject to the rules of *res adjudicata* as well as being subject to estoppel, both of

which preclude appellant from attacking the decrees of the District Court upon any grounds.

One who accepts the benefits of a judgment decree or judicial order is estopped to deny the validity thereof. (*Wilson* v. *Union Electric L. & P. Co.*, 8th Cir., 59 F. 2d 580; *Livesay Industries* v. *Livesay Window Co.*, 5th Cir., 202 F. 2d 378.

Appellant claims his motion to vacate the final decree of June 4, 1947 and all subsequent proceedings was improperly denied. He relies on Rule 60 (b) F. R. C. P. the pertinent part of said rule providing as follows:

> "On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment order or proceeding for the following reasons: * * * (4) the judgment is void; * * *. The motion shall be made within a reasonable time. A motion made under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * * Writs of *coram nobis, coram vobis, audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed by these rules or by an independent action." (28 U. S. C. A., F. R. C. P., Rule 60 (b)).

Rule 60 (b) (4) applies only to void judgments. The decree of June 4, 1947 and subsequent decrees were not void judgments, hence they are not subject to vacation under said rule. Rule 60 (b) (4) was not intended as, and it is not a substitute for a direct appeal from an erroneous judgment. This rule was not designed to circumvent the policy evidenced by the rule limiting the time for appeal. (*Ackerman* v. *United States*, 340 U. S. 193.) It should be noted that Rule 60 (b) requires that "the motion shall be made within a reasonable time." This requirement has not been met by appellant.

Appellant contends that the order upon the petition of American National Bank, which enjoined him from prose-

cuting in the State Court his suit against said bank, was erroneous. This order also directed appellant to comply *nunc pro tunc* with the decree of June 4, 1947 which required appellant to give his direction to the bank to convey the Drexel property to The Northern Trust as successor trustee under the provisions of Maurice Taussig's Will. It was evident appellant's State Court action was founded on his deliberate disobedience of the District Court's Order and it is clear that the Court on the Record before it had the power to enforce compliance with the decree. That power comes through the provision of Sec. 2283, 28 U. S. Code which expressly provides that a Court of the United States may grant an injunction to stay proceedings in a State Court 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments'. That was the purpose of the injunction. Appellant cites *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 211 F. 2d 449. This case expressly held that the injunction sought was not in aid of the federal courts' jurisdiction or to protect or effectuate a judgment of that court, the ground of the action being only that the state court action constituted an invasion of the N. L. R. B. *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118, cited by appellant was rendered prior to the enactment of Sec. 2283, the purpose of which was to overcome the effect of the Toucey decision and to give federal courts the power to enjoin the relitigation of cases and controversies which have been fully adjudicated in such courts. (*Jackson* v. *Carter*, 10th Cir., 179 F. 2d 524.)

No good purpose can be accomplished in extending this opinion. We find no reasons for reversal and it is therefore ordered that the Orders of the District Court upon the Motion and upon the Petition entered on June 26, 1957, be and they are hereby affirmed.

Affirmed.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 405

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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SUBJECT INDEX.

	PAGE
Opinions of Court Below and Related Decision	2
The Questions Presented for Review	3
Statement of the Case	3
Summary of Proceedings	3
Jurisdictional Facts	4
Petitioner's Adversaries	6
Argument	8
I. The June 4, 1947 and Subsequent Unappealed Decrees Were Not Void and Are Res Judicata	8
II. All Issues Were Determined in Adversary Proceedings	9
III. There Is No Conflict Between the Decision of the Court of Appeals and Any Decision of This Court	10
IV. There Is No Conflict Between Courts of Appeals	11
V. The Questions of Law Here Involved Are Peculiar to the Facts of this Case and Are of No General Importance	12
VI. The Decision of the Court of Appeals Is Based on Several Alternative Valid Grounds	13
Conclusion	15

Citations.

Cases.

Baldwin v. Iowa State Traveling Men's Association, 285 U. S. 522 9

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 9

Dowell v. Applegate, 152 U. S. 327 9

Evers v. Watson, 156 U. S. 527 9

Fidelity Casualty Co. of N. Y. v. Federal Express, 2 Cir., 136 F. 2d 35 10

Jackson v. Irving Trust Co., et al., 311 U. S. 494 9

Stoll v. Gottlieb, 305 U. S. 165 9

Taussig v. Chicago Title and Trust Company, 171 F. 2d 553 2

Ex Parte Joseph M. Taussig, Petitioner, No. 9586 (Tr. 333-337; cert. den. 355 U. S. 829) 2

Treines v. Sunshine Mining Co., 308 U. S. 66 9

Statutes and Rules:

Rule 60 (b) (4) of Federal Rules of Civil Procedure, 28 U. S. C. A. 3, 4, 6, 14

Sec. 2283, 28 U. S. C. A. 14

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AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST No. 4954,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

This brief is respectfully submitted not only on behalf of the named Respondent, American National Bank and Trust Company of Chicago (herein called "American National"), but also on behalf of Chicago Title & Trust Company (herein called the "Title Company"), the Northern Trust Company (herein called the "Successor Trustee") and Ruth Saxelby, the original plaintiff in the proceedings below. Although American National is the only Respondent named by Petitioner, the other parties joining in the brief were nevertheless also his adversaries in the District Court and Appellees in the Court of Appeals.

Petitioner's statement of the proceedings and issues and his statement of the case are incomplete and inaccurate and therefore restatement is deemed necessary.

OPINION OF COURT BELOW AND RELATED DECISIONS

It is desired to call the Court's attention at the outset to the fact that in addition to the opinion of the Court of Appeals for the Seventh Circuit reported in 255 F. 2d 765 (which is printed as an Appendix to the Petition but without corrections made by the Court and should therefore be read from the official report), there are certain other opinions and orders which have been rendered in the course of this protracted litigation (begun in 1945) which are pertinent to the issues here presented.

In the October, 1947 Term of the Court of Appeals, Petitioner, on the same alleged jurisdictional grounds as are here asserted, petitioned that Court for a writ of mandamus directing the District Court to vacate and expunge as "void" all its decrees and orders in the case (C. A. No. 45 C 2271). The petition was denied by the Court of Appeals in an unreported opinion (*Ex Parte Taussig*, No. 9586, Tr. 333-337*) and certiorari was denied by this Court ten years ago (*Taussig* v. *Barnes*, Docket No. 78, October Term, 1948, 335 U. S. 829).

In 1946 Petitioner filed third party proceedings against the Title Company in said Cause No. 45 C 2271 on a title policy on the "Drexel property" mentioned in the petition, thus invoking the jurisdiction of the Court. The District Court rendered judgment for the Title Company (Supp. App. 9-18) which was affirmed by the Court of Appeals (*Taussig* v. *Chicago Title*, 171 F. 2d 553).

* We adopt the record designations used by Petitioner, namely, "Tr." for the transcript taken from *Ex Parte Taussig*, C. A. 7, No. 9586; "App." for Appellant's Appendix and "Supp. App." for Appellees' supplemental appendix in Nos. 12137-8. However, in that part of the transcript taken from No. 9586 where new page numbers have been stamped over the original printed page numbers to give numerical sequence to all the pages of the transcript, references in this brief are to the *stamped* page numbers.

It thus appears that this is not the first time the Court of Appeals and this Court have had occasion to consider the question of jurisdiction which Petitioner now again seeks to present.

THE QUESTIONS PRESENTED FOR REVIEW.

The true questions here presented for review are those set forth by the Court of Appeals (Pet. for Cert., p. 20), namely: Whether an issue determined and confirmed by seven unappealed final decrees is *res judicata*; whether estoppel can be invoked against a party who induced the actions of which he complains and who obtained direct benefits from the decrees which he attacks; whether a federal court can protect its decrees by appropriate injunction against one who disobeys them; and whether the District Court correctly denied Petitioner's unconscionably belated motion under Rule 60(b), FRCP, to vacate a series of unappealed decrees which have been fully and irrevocably complied with by all parties except the movant.

Underlying all these questions is a more basic one: Whether an issue adjudicated and re-adjudicated by federal courts of competent jurisdiction can be relitigated forever.

STATEMENT OF THE CASE.

Summary of Proceedings.

On June 4, 1947, at the suit of Ruth Saxelby, Petitioner's sister, the District Court entered a final decree in said Cause No. 45-C-2271 deposing Petitioner as a trustee under their father's will and directing the restoration of trust real estate—an apartment building known as "the Drexel property"—which the Court held Petitioner had secretly acquired for his own benefit (Tr. 179, 180, 204-209). Petitioner had placed title to the Drexel property in American

National as trustee under a land trust of which Petitioner was sole beneficiary (Tr. 171-180). The decree of June 4, 1947 ordered American National to convey such property to the Successor Trustee and ordered Petitioner to execute a direction for such conveyance (Tr. 206-7). American National made the conveyance; Petitioner failed to execute the direction (App. 96, 163). Petitioner did not appeal from this decree (Tr. 294).

The District Court, between 1947 and 1952, entered six subsequent final orders and decrees, three of them with the express consent of Petitioner, under which the Successor Trustee distributed the trust property (App. 57-60, 81-108, 109-123, 133-141; Supp. App. 62-66, 67-71, 87-101). Petitioner, as a beneficiary under his father's will, shared in the benefits of this distribution, *including his share of the proceeds of the sale of the Drexel property* (App. 113-114; Supp. App. 37-41, 74-75, 81-86, 93-101). None of these subsequent orders or decrees was appealed.

On June 6, 1957, ten years after the entry of the 1947 decree, Petitioner filed a suit in a state court against American National asking damages in the amount of $500,000 because of its conveyance of the Drexel property to the Successor Trustee in compliance with the decree of the District Court of June 4, 1947. Petitioner thereafter, on June 26, 1947, filed a motion under Rule 60 (b) (4) to vacate and expunge the final decree of June 4, 1957 and all subsequent proceedings and decrees (App. 142-147). On the same day, namely, June 26, 1957, American National petitioned the Court for an order enjoining the prosecution of Petitioner's state court suit and ordering Petitioner to execute the direction required by the 1947 decree (App. 150-154, 191-193).

The District Court first heard Petitioner's motion (172-182) made under Rule 60 (b) (4), which by admission of Petitioner's counsel "* * * would of course necessarily

determine the affirmative relief which is being presented to the court by American National Bank * * *" (App. 174), and denied the motion. The Court then granted American National's petition for injunction on the ground that Petitioner's State court action was founded on his disobedience of the Federal Court's order (App. 184, 191). In this connection the Court found the petition allowable on the facts already litigated and determined in the case, saying (App. 183): "I don't think I should go over ground I went over ten years ago, and I don't see why the parties should be required to go over ground they went over ten years ago."

Jurisdictional Facts.

In the original complaint filed by Ruth Saxelby on December 20, 1945 (Tr. 42-61), federal jurisdiction was based upon diversity of citizenship (Tr. 43). The complaint alleged that plaintiff was a citizen of New York and that the citizenship of defendants was as follows: Petitioner, Illinois; Irving H. Robitshek (co-trustee with Petitioner, also removed by the 1947 decree), Minnesota; Leo Taussig (a life beneficiary), Wisconsin; Rose Goodman (a residuary beneficiary), Wisconsin; Ella Robitshek (a residuary beneficiary), Minnesota; American National, Illinois (Tr. 42-43). Petitioner's answer admitted these allegations (Tr. 99).*

Petitioner's attack upon the jurisdiction of the District Court arises, not from any "jurisdictional defect" on "the face of the record" as alleged in the petition, p. 10, but from the Court's refusal after trial to realign as a plaintiff

* Petitioner had also sought from time to time to defeat jurisdiction by moving to realign as plaintiffs the defendant wife of defendant Irving H. Robitshek (who had sided with her husband and Petitioner in resisting the plaintiff) and a non-party, Fannie Daus (who had died before trial without acquiring any interest in the estate). (Tr. 79-84, 147-151, 190-3; App. 22-29, 109-123.) None of these motions was allowed. (Tr. 203, 334.) Petitioner has apparently abandoned these jurisdictional attacks—at least his petition seems to center only upon Leo. (Pet. for cert. pp. 9-10.)

a deceased party defendant whose life interest had terminated. Leo Taussig, a defendant, had originally been assumed by all parties, including Petitioner, to have been a citizen of Wisconsin (Tr. 43, 99). Leo died before the trial. After the case had been tried and the Court had decided it against Petitioner, and after Leo's death had been noted of record, Petitioner asserted that Leo had really been an Illinois citizen (having been moved to an institution in Wisconsin as an incompetent). Petitioner then moved for the first time to have Leo, who was then dead, realigned as a plaintiff and to dismiss the suit because of Leo's common citizenship with Petitioner (Tr. 190-3; App. 22-29). The Court entered a supplementary finding that Leo had been an Illinois citizen, dismissed him as a party defendant, and declined to realign the parties (Tr. 199-200; App. 29). Denying Petitioner's motion and reaffirming its jurisdiction, the Court entered its unappealed final decree of June 4, 1947 (Tr. 199-201, 203).

Petitioner's Adversaries.

Petitioner names only American National as a Respondent and states: "Petitioner asserted no claim against the parties to whom he occupied an adversary position in the original proceeding of *Saxelby* v. *Taussig*" (Pet. for cert. p. 15).

This statement is hard to reconcile with Petitioner's request that this Court review the denial of his motion under Rule 60(b), by which Petitioner sought to wipe out the entire proceeding and to destroy the adjudicated rights of Ruth Saxelby (the original plaintiff and Petitioner's original adversary, in whose favor the June 4, 1947 decree was entered after an 18-month contest) and of the Successor Trustee (who was appointed to replace Petitioner under the 1947 decree and who thereafter administered the

trust estate under the orders and decrees attacked by Petitioner herein).

Although Petitioner has not seen fit to name these parties as Respondents, they, as well as the Title Company and American National, are his adversaries here, as they were below.

ARGUMENT.

I.

THE JUNE 4, 1947 AND SUBSEQUENT UNAPPEALED DECREES WERE NOT VOID AND ARE RES JUDICATA.

An examination of the record (Tr. 167-186; Tr. 199-201; App. 11, 12, 16, 19; Tr. 159; App. 29) will show that the plaintiffs (Ruth Saxelby's children were added as plaintiff's after the complaint was filed) were at all times residents of New York and the defendants were all citizens of states other than New York. The residence of Leo Taussig was immaterial so long as he was not found to be a citizen of New York. Neither the Petitioner nor anyone else suggested that he should be realigned or that he was not a citizen of Wisconsin, as had been admitted by Petitioner in his answer, until after he was dead and his interest terminated, and after the case had been tried and decided against the Petitioner. When he was dismissed from the case after his death he was dismissed as a defendant.

While it is true that the Petitioner at that late stage argued for a realignment, the District Court found it unnecessary to realign the parties, found that it had jurisdiction and entered the final decrees heretofore enumerated, from which Petitioner did not appeal.

The unalterable fact is, as found by the Court of Appeals in the subsequent mandamus proceeding instituted by Petitioner in 1948, that "for reasons best known to * * * Petitioner, * * * a well-trained lawyer of great ability and considerable experience (petitioner), saw fit not to avail himself of his right to appeal, waiving that right by agreement and by failure to exercise it within the time limited by

statute for perfecting an appeal. Thus, it was his own action or inaction, not that of the Court, which deprived him of Appellate review of the judgment now sought to be vacated and expunged * * *" (Tr. 337).

The following decisions of this Court, which are cited in the opinion of the Court of Appeals, firmly establish the principle of law that the final orders of a federal court entered in a proceeding where the issue of jurisdiction has been raised in an actual controversy between parties who have been brought before the court in accordance with the requirements of due process, and from which no timely appeals have been taken, are not void and cannot be set aside and expunged on a belated motion to vacate:

Jackson v. Irving Trust Co. et al., 311 U. S. 494, 503; affirming *Sorenson, et al. v. Sutherland, et al.*, 109 F. 2d 714, 718, 719.

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, 376.

Stoll v. Gottlieb, 305 U. S. 165, 171, 172, 174, 176.

Treinies v. Sunshine Mining Co., 308 U. S. 66, 78.

Ewers v. Watson, 156 U. S. 527, 533.

Dowell v. Applegate, 152 U. S. 327, 337, 340.

Baldwin v. Iowa State Traveling Men's Association, 283 U. S. 522, 527.

II.

ALL ISSUES WERE DETERMINED IN ADVERSARY PROCEEDINGS.

There is no question here of unlitigated rights as between nonadversary co-defendants, as Petitioner would have the Court believe. Petitioner's original adversaries are still in the case; the device of not naming them as Respondents cannot make them disappear. Every issue

was litigated and adjudicated. Expressly adjudicated were American National's obligation to convey to the Successor Trustee the Drexel property which Petitioner had secretly placed in its name and Petitioner's obligation to execute a direction authorizing such conveyance. In fact the very essence of Ruth Saxelby's suit was to have this Drexel property restored to the trust and that was the primary subject of the litigation.

It is immaterial that Petitioner and American National were originally co-defendants. As held in the case of *Fidelity Casualty Co. of N. Y.* v. *Federal Express*, 2 Cir., 136 F. 2d 35, 39:

> "Insofar as the rights or obligations of co-parties inter se are dependent on their rights or obligations toward their common adversary, the judgment adjudicating the latter is conclusive upon co-defendants in subsequent litigation between them."

III.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND ANY DECISION OF THIS COURT.

Neither *Mitchell* v. *Maurer*, 293 U. S. 237, *Gilbert* v. *Davis*, 235 U. S. 561, nor *Indianapolis* v. *Chase National Bank*, 344 U. S. 63, holds that objections to diversity jurisdiction are open to perpetual re-examination even after they have been finally adjudicated by unappealed final decrees. In none of these cases was the issue of *res judicata* involved; furthermore, jurisdiction was considered on direct review, not, as here, by a belated motion to vacate. *United States* v. *United States Fidelity & G. Co.*, 309 U. S. 506 did not involve diversity jurisdiction but rather the power of the court to enter judgment against the sovereign without its consent. It in no way affects the force or effect of any

of the numerous decisions of this Court cited by the Court of Appeals.

These are the only Supreme Court cases relied on by Petitioner and obviously there is no conflict with any of them.

IV.

THERE IS NO CONFLICT BETWEEN COURTS OF APPEALS.

On pages 10 and 11 of the petition, effort is made to show that "the decisions of the Courts below are in conflict with the decisions of other Courts of Appeals". That is not true, as a brief review of the cases cited will show.

Dobbins v. *Barnes*, 9 Cir., 204 F. 2d 546, simply held that a decision of the Tax Court upon a tax due to the United States did not adjudicate rights as between a taxpayer-trustee and a beneficiary of the trust; as the Court of Appeals stated, the Tax Court had no jurisdiction to resolve any issue between trustee and beneficiary. However, the case did hold that a prior state court judgment approving the trustee's accounting was *res judicata* between the trustee and the beneficiary who, as here, had accepted distribution. To the extent that *Dobbins* is pertinent, it supports the decision below.

City Bank of Wheeling v. *Rhodehamel*, 4 Cir., 223 F. 979, is not remotely in point; *Ohio Casualty Company* v. *Gordon*, 10 Cir., 95 F. 2d 605, upheld a plea of *res judicata* as between record co-defendants.

State of Missouri v. *Title Guaranty and Surety Co.*, 8 Cir., 72 F. 2d 595, and *Mitchell* v. *Village Creek Drainage District*, 8 Cir., 158 F. 2d 475, involved questions of state, not federal, jurisdiction. The first case simply held that a Missouri Probate Court order was a nullity under Missouri law. The second held that prior Arkansas judgments were valid under Arkansas law and thus *res judicata*

in the federal court. The latter opinion concludes with this apposite statement:

> "* * * [I]f this were not true, litigation would not end until the parties had no more money [and until] the ingenuity of counsel in suggesting additional grounds in support of the issue had been exhausted." (158 F. 2d, at 478).

Hicklin v. *Edwards*, 8 Cir., 226 F. 2d 410, cited on page 15 of the petition, and *United States* v. *Sotis*, 7 Cir., 131 F. 2d 783, cited in the text book quotation on page 14, involved default judgments entered without personal jurisdiction. Here the District Court had personal jurisdiction over all parties, including Petitioner.

It is thus evident that there is no conflict whatever between Circuits.

V.

THE QUESTIONS OF LAW HERE INVOLVED ARE PECULIAR TO THE FACTS OF THIS CASE AND ARE OF NO GENERAL IMPORTANCE.

We think it is evident that the issues of this case are concerned only with a very special state of facts and are of significance only to the parties to the controversy. The question of whether the District Court committed error in 1947 by dismissing a deceased party defendant, whose interest in the trust involved had terminated, and denying a belated motion for realignment made by Petitioner in a desperate effort to evade a decision which had gone against him, is certainly not a proper one for review by this Court on writ of certiorari. Even if the Trial Court had been in error, which it was not, its decision could only have been reviewed on a timely appeal.

VI.

THE DECISION OF THE COURT OF APPEALS IS BASED ON SEVERAL ALTERNATIVE VALID GROUNDS.

While the *res judicata* ground of the decision is in itself sufficient and controlling, the Court also gave other equally valid grounds for its conclusion, and for this further reason the decision is unassailable.

As shown by the decision (App. to Pet. for cert. 22-23), Petitioner is clearly estopped to attack the unappealed and consent decrees in this case. The fact that he accepted his distributive share of the Drexel property (the principal subject matter of the suit) in itself constitutes a complete estoppel. As the Court said, "One who accepts the benefits of a judgment, decree or judicial order is estopped to deny the validity thereof." Furthermore, his motion to vacate in the Court below and his present petition are directly in violation of a settlement decree entered on his stipulation in 1948 (referred to by the Court of Appeals, Pet. for cert., p. 20) in which he expressly "waived any and all right of appeal * * * directly or indirectly" and agreed that "the Successor Trustee and all the parties hereto shall be entitled to rely upon the provisions of this decree and to carry out such provisions forthwith and to change position in reliance thereon * * *" (App. 106).

Petitioner, aware of the validity and devastating effect of this independent ground of the decision, sought to escape it by the thinly-veiled device of omitting Ruth Saxelby and the Successor Trustee as named respondents in his petition. But of course their rights are directly affected and the rights of all of Petitioner's adversaries, including American National, are so inextricably bound together that no valid distinction can be drawn between them.

The Court of Appeals also solidly based its decision on the ground that the "reasonable time" prerequisite of Rule 60 (b) (4) was applicable and had not been met by Petitioner (App. to Pet. for cert. p. 23).

A complete answer to Petitioner's assertion (Pet. for cert. p. 12) that the granting by the District Court of the injunction on American National's petition "offended the prohibition of 28 U. S. Code § 2283" is contained in the next to the last paragraph of the opinion (App. to Pet. for cert. p. 24), where it is clearly shown that such action was within the expressly granted power of a United States Court to enjoin parties from proceeding in a State court where necessary to "protect or effectuate its judgments."

CONCLUSION.

We respectfully submit that the petition for certiorari is wholly without merit and should be denied.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justices of the Supreme Court of the United States:

A small portion only of Respondent's Brief in opposition in this cause is addressed to the propositions urged in the Petition for a Writ of Certiorari:

I.

JURISDICTION IS DETERMINED BY THE STATE OF THINGS AT THE TIME SUIT IS FILED.

Leo Taussig, an Indispensable Party Plaintiff on Whose Behalf the Suit Was Filed, Was a Citizen of Illinois. Joseph M. Taussig, Petitioner and Defendant, Was a Citizen of Illinois.

The basic fallacy in Respondent's position is exemplified by Respondent's statement (Brief, p. 8): "The residence of Leo Taussig was immaterial so long as he was not found to be a citizen of New York." Of course as this Court expressly decided in *Indianapolis v. Chase National Bank*, 314 U. S. 63, 68, 69, it was the duty of the Courts below to "look beyond the pleadings and arrange the parties according to their sides in the dispute."

Moreover, it is axiomatic that diversity of citizenship depends upon the state of things at the time the suit was brought (*Mollan v. Torrance*, 9 Wheat. 537, 539, 6 U. S. 172, 173, *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 382).

Leo Taussig was the real indispensable party in interest at the time the *Saxelby* suit was brought (Tr. 23, 24, App. 61). The suit was brought on his behalf (Tr. 60). He was at all times a citizen of Illinois and so found by the court (Tr. 200). Defendant and present Petitioner, Joseph M. Taussig, was also a citizen of Illinois and so found by the court (Tr. 168). Leo Taussig's subsequent death and belated dismissal as a party, is and was of no significance whatsoever in the determination of the District Court's federal jurisdiction over the suit.

II.

NEITHER RESPONDENT AMERICAN NATIONAL, NOR CHICAGO TITLE AND TRUST COMPANY WERE PARTIES TO ANY POST-DECREE AGREEMENTS; THE REMAINING PARTIES BELOW HAVE NO INTEREST WHATSOEVER IN THE STATE COURT RIGHTS HERE SOUGHT TO BE PRESERVED.

Respondent, American National Bank and Trust Company of Chicago as Trustee, hereafter referred to as American National, has not met the real issue in this case. By the Illinois state court proceeding, enjoined below, petitioner sought to litigate, and only to litigate his contract rights against American National, arising as a result of American National's failure and refusal to comply with petitioner's timely demand that it, as petitioner's trustee appeal from the decree of June 4, 1947, and also that it notify Chicago Title and Trust Company so to do (App. 160). American National did not appeal. Instead, without awaiting the expiration of the automatic ten-day stay of execution (Rule 62a F. R. C. P.) it conveyed the Drexel property to the successor trustee, without directions from petitioner as its beneficiary and forthwith resigned its trust (App. 151, 160).

None of the remaining appellees in the court below has any interest whatsoever in the pending litigation between petitioner and American National, his former trustee. Petitioner has not now, nor has he ever sought to abrogate his financial obligations to these parties, arising as a result of his agreement not to appeal, entered into after American National had made its premature and unauthorized conveyance (App. 126, 147). On the contrary, he has repeatedly asserted his intention to prosecute his contract rights against American National and Chicago Title and Trust Company only (App. 126, 147).

Neither American National or Chicago Title was a party to any of the subsequent stipulations or agreements in the cause.

No considerations of estoppel are present as to Respondent, American National and Chicago Title and Trust Company. Not only were these parties at all times aware of Petitioner's serious objections to the jurisdiction of the court below, but American National had itself raised similar jurisdictional objections (Tr. 38, 42, 51, 58, 59). It is only with respect to these parties that petitioner deems himself entitled to relief upon his Motion under Rule 60b F. R. C. P. In these proceedings, petitioner again ratified his undertakings with the parties to the stipulation (App. 126, 147).

Neither *Ex Parte Taussig*, No. 9586, Tr. 333-337, *Taussig* v. *Barnes*, 335 U. S. 829, or *Taussig* v. *Chicago Title*, 171 F. 2d 553 (Brief, p. 2) are of significance here. *Ex Parte Taussig* was a mandamus proceeding involving a discretionary writ. *Taussig* v. *Chicago Title*, was a proceeding upon a guaranty policy in which the result was predicated upon the non-appealed from Decree of June 4, 1947. No question of jurisdiction was determined in any of these cases.

Respondent's characterization (Brief, p. 3) that petitioner "had secretly acquired for his own benefit" the Drexel property, is hardly correct. The petition filed of record in the Probate Court of Cook County upon which the sale was approved, disclosed that petitioner was to repurchase the title in his individual capacity (Tr. 116). Ironically, present counsel for respondent American National represented petitioner in those proceedings in the Probate Court of Cook County, Illinois (Tr. 280, 303) (Printed Nos. 239, 262). The sale in question was at

issue between Ruth Saxelby and petitioner, in the Probate Court at the time *Saxelby* v. *Taussig* was instituted in the court below (Tr. 143, 144) (Printed Nos. 102, 103).

III.

THERE HAS BEEN NO PRIOR ADJUDICATION OPERATIVE AS A BAR TO PETITIONER'S CONTRACT RIGHTS AGAINST AMERICAN NATIONAL.

Respondent relies upon *Fidelity Casualty Co. of N. Y.* v. *Federal Express*, 136 F. 2d 35, 39 (Brief, p. 10). That case was an action for indemnity brought by one joint tort feasor defendant against another. Significantly, immediately after the statement quoted by respondent (Brief, p. 10) the Court of Appeals for the Second Circuit, quoting from *Wright* v. *Schick*, 134 Ohio St. 193, said (136 F. 2d at p. 39):

> "'It is universally recognized that a former judgment in order to be *res judicata* in a subsequent action must have been rendered in an action in which the parties to the subsequent action were adverse parties. The character of a party, as adverse or otherwise is to be determined not by his position on the docket, or in the title of the cause, but by reference to his relations to the other parties, as shown by his interests involved in the case. * * *'"

Here, the actions complained of by petitioner took place *after* the entry of the decree of June 4, 1947. Obviously that decree could not be controlling with respect to litigation arising from these subsequent acts.

CONCLUSION.

It is respectfully submitted that a Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered April 2, 1958, and that upon such review, said Court's judgment in Cause 12137 should be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois with directions to vacate the permanent and mandatory injunctions appealed from, and with respect to that Court's judgment in Cause 12138, that said judgment be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois, with directions to grant Petitoner's motion to vacate its decree of June 4, 1947, and all subsequent decrees with respect to Respondent, American National Bank and Trust Company of Chicago, and after hearing, that said Court enter such order as may be just under the circumstances with respect to the remaining parties to said decree.

Respectfully submitted,

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